Supreme Court, U.S.
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No. 01-888

In The

Supreme Court of the United States

CHOICE HOTELS INTERNATIONAL, INC.,

Petitioner,

v.

JAMES L. TICKNOR; JANET TICKNOR; LARRY TICKNOR; TICKCO HOLDING, L.L.C., AND TICKNOR LODGING CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Ninth Circuit Court of Appeals erred when it held that, under the law of the State of Montana, the arbitration clause in the franchise agreement between the parties was unconscionable.

2. Whether the Federal Arbitration Act (9 U.S.C. § 1 *et seq.*) preempts application of Montana law concerning the unconscionability of the arbitration clause contained in the franchise agreement.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, respondents Tickco Holding, LLC and Ticknor Lodging Corporation, through counsel, state that they have no parent corporations, and that no publicly-held company owns 10% or more of its stock (Ticknor Lodging Corporation) or membership interests (Tickco Holding, LLC).

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents James L. Ticknor, Janet Ticknor, Larry Ticknor, Tickco Holding, L.L.C., and Ticknor Lodging Corporation (collectively "Ticknors") respectfully oppose the petition for a writ of certiorari requested by Choice Hotels International, Inc.

STATEMENT OF JURISDICTION

Certiorari is not appropriate because the Ninth Circuit's decision does not conflict with an applicable decision of this Court or of any other Circuit Court of Appeals.

STATEMENT OF THE CASE

A. FACTS

Respondents James Ticknor and Ticknor Lodging Corporation signed a franchise agreement with Choice Hotels International, Inc., in 1998. Petition, App., p. 2. Under the agreement, the Ticknors were to pay franchise fees, and Choice was to allow them to use the Econo-Lodge mark and provide certain assistance. *Id.* The other respondents, Janet and Larry Ticknor and Tickco Holding, L.L.C., signed a separate guarantee. *Id.* There were 2 addenda to the franchise agreement. *Id.*, p. 4. The franchise agreement and the addenda were generated by Choice, and the Ticknors were "forced to accept or reject without negotiation." *Id.*, p. 12.

The franchise agreement contains an arbitration clause providing that arbitration would occur at Choice's "headquarters office in Maryland." *Id.*, p. 3. The arbitration clause required all of the Ticknors' claims to be arbitrated, but excepted from its scope any claims that Choice may have against the Ticknors for "indemnification, actions for collections of moneys owed us under the Agreement, or action seeking to enjoin you . . . " *Id.* The guarantee agreement contained no arbitration clause. *Id.*, pp. 4-5.

Disagreements arose between the parties concerning Choice's performance or non-performance and the Ticknors suspended payment of the franchise fees. *Id.*, p. 4. Choice then commenced arbitration proceedings. *Id.*, p. 4. The claims which Choice sought to arbitrate were for "fees, service charges and damages for lost profits pursuant to a franchise agreement." Exhibit 6 to Sept. 15, 1999 hearing, admitted at transcript p. 4. The franchise agreement's arbitration clause, of course, had excepted from arbitration all of Choice's claims against Ticknors for "moneys owed us under the Agreement."

Facing arbitration in Choice's corporate headquarters of claims which they had never agreed to arbitrate, the Ticknors brought this action. Petition, App., pp. 4-5. In their complaint, the Ticknors pled not only that the arbitration clause did not require arbitration of Choice's claims, but also that the arbitration clause was invalid as unconscionable. *See* Amended Complaint.

Choice moved to compel arbitration and, after an evidentiary hearing, the District Court denied it on the grounds that the arbitration clause was unconscionable

and therefore unenforceable. *Id.*, p. 5. The Ninth Circuit affirmed. *Id.*, p. 17.

B. THE NINTH CIRCUIT DECISION

Choice portrays this case as having great significance. To the contrary, this case concerns an extremely narrow issue of state law: Given the facts of the case, is the agreement to arbitrate invalid as unconscionable under the law of the state of Montana? This is evident from the Ninth Circuit opinion itself. The Ninth Circuit noted that the Ticknors had raised "the state law defense of unconscionability . . . " Petition, App., p. 7. The Ninth Circuit then applied Montana's choice of law analysis (Petition, App., pp. 7-9), and Montana law regarding unconscionability (Petition, App., pp. 11-15). The Ninth Circuit then held that the district court had not erred in finding that the arbitration clause "was unenforceable as unconscionable under Montana law . . . " Petition, App., p. 17.

The only other issue is preemption: whether the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA") preempts application of that Montana law. As is shown below, this Court has declared, on numerous occasions, that such state law principles of general applicability may be applied, and are not preempted by the FAA. Montana's law of unconscionability is such a generally applicable principle. Thus, there is no conflict with the decisions of this Court.

C. STATUTORY FRAMEWORK

Congress enacted the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1-16 (1999), to overcome judicial hesitation to enforce arbitration agreements. *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 478 (1989). The FAA does not require arbitration; only that courts enforce valid agreements to arbitrate. *Volt*, 489 U.S. at 478.

Thus, § 2 of the FAA merely provides that an agreement to arbitrate is enforceable just as any other agreement, and subject to the same defenses which would support the revocation of any other agreement.

> A written provision . . . to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

Because arbitration agreements are enforceable, a party may obtain a stay of a legal action over an issue which the parties agreed to arbitrate. The FAA does not, however, make issues arbitrable absent a binding agreement to arbitrate.

> If any suit or proceeding be brought in any of the courts of the United States *upon any issue referable to arbitration under an agreement* in writing for such arbitration, the court in which such suit is pending, *upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement*, shall on

> application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement.

9 U.S.C. § 3 (emphasis added).

Besides staying litigation over issues that the parties agreed to arbitrate, the court can force the party to arbitrate, but only if the court is satisfied that a binding agreement to arbitrate exists. Thus, a party aggrieved by the failure of another to arbitrate "under a written agreement for arbitration" may petition a court to compel arbitration.

> The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. . . . If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default . . . the court shall hear and determine such issue.

9 U.S.C. § 4. The remainder of section 4 provides for a jury trial, if requested, on the making of the agreement to arbitrate, and requires dismissal of the petition to compel arbitration if the jury finds no agreement. *Id.*

Thus, under the FAA, because the Ticknors contested the validity of the arbitration agreement, it was the duty of the district court summarily to try and decide that issue. That is what happened. The district court held an evidentiary hearing (Petition, App., p. 5), and decided

that, under the facts of this case, the arbitration clause was unenforceable. *See generally* Petition, App., pp. 23-34.

In doing so, the district court applied Montana state law regarding unconscionable contracts. Petition, App., pp. 29-33. The Ninth Circuit did likewise. Petition, App., pp. 11-15. This is entirely consistent with federal law.

Section 2 of the FAA states that arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." The source of that law is obviously state law. Indeed, this Court has declared on numerous occasions that state contract principles may be applied.

> States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause "upon such grounds as exist at law or in equity for the revocation of any contract."

Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 281 (1995). Yet again, in *Casarotto*, this Court stated:

> Repeating our observation in *Perry*, the text of § 2 declares that state law may be applied "if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." Thus, generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2.

Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 686-87 (1996). *See also Perry v. Thomas*, 482 U.S. 483, 492, n.9 (1987). Thus, this Court has clearly stated that state law principles of unconscionability may be applied "without

contravening" the FAA. That is what the lower courts did.

ARGUMENT

I. THERE IS NO SPLIT AMONG THE CIRCUITS.

Choice attempts to demonstrate a conflict between the Ninth Circuit and other Courts of Appeals by citing cases from other circuits which refused to invalidate arbitration clauses on the grounds of a lack of mutuality of obligation. Petition, pp. 21-23. The resulting "conflict" is an illusion. In fact, the cases cited by Choice, like the Ninth Circuit, applied state law of general applicability. Some of them reached different results, not because of any conflict about the rule of law to be applied, but because they considered different arbitration clauses, under different sets of facts, in light of different arguments, and applying the law of different states.

The Ninth Circuit did not find the arbitration clause at issue to be unenforceable solely on the basis of a lack of mutuality of obligation. It found it to be unconscionable because it was, *inter alia*, "unreasonably favorable to the drafter." Petition, App., p. 14. Indeed, the Ninth Circuit specifically recognized that, under Montana law, "[t]here is no requirement that . . . 'arbitration agreements must contain mutual promises that give parties identical rights and obligations or that the parties must be bound in the exact same manner.' " Petition, App., pp. 13-14, *quoting Iwen v. U.S. West Direct*, 293 Mont. 512, 977 P.2d 989, 996 (1999). The Ninth Circuit understood that,

rather than requiring exact mutuality, Montana law simply inquires as to whether the disparities are so one sided and unreasonably favorable to the drafter so as to be oppressive and unconscionable. *Id.*, p. 14. The Ninth Circuit thus did not decide the case based upon a lack of mutuality of obligation, and it avails nothing to try to compare its decision to cases which did.

That different courts have reached different results on the issue of unconscionability of a particular clause in a particular fact situation would hardly be surprising, given that it is a fact intensive question of state law. The unconscionability analysis is a question of state law. *See Casarotto, supra.* The Ninth Circuit in this case applied Montana law. None of the cases cited by Choice applied Montana law. *See, e.g., Johnson v. Circuit City Stores, Inc.*, 148 F.3d 373, 376 (4th Cir. 1998), *cert. denied*, 530 U.S. 1276 (2000) (applying Maryland law); *Harris v. Green Tree Financial Corp.*, 183 F.3d 173, 181 (3rd Cir. 1999) (Pennsylvania law); and *Michalski v. Circuit City Stores, Inc.*, 177 F.3d 634, 637 (7th Cir. 1999) (Wisconsin law). To the extent the law varies from one state to another, different results may be expected, particularly given the fact intensive nature of the inquiry.

Further, the entire analysis is highly dependent upon the facts of each case. *See, e.g., Zalewski v. Simpson*, 435 N.E.2d 74, 78 (Ind. App. 1982) ("[i]t is impossible to lay down any definite rules as to what may or may not be unconscionable, for each case must depend upon its own particular facts"); *Wilkerson v. Wilkerson*, 555 S.W.2d 689, 691 (Mo. App. 1977) (whether a property settlement is

unconscionable is a question which "depends on the particular facts of each individual case"); *220 West 42 Associates v. Ronbet Newmark Co.*, 84 Misc.2d 259, 263, 375 N.Y.S.2d 255, 260 (1975).

A review of the cases cited by Choice reveals no direct conflict. *O'Neil v. Hilton Head Hospital*, 115 F.3d 272 (4th Cir. 1997) did not even address an argument that the arbitration agreement was unconscionable. Instead, the argument was a lack of consideration because the hospital was supposedly not bound by the arbitration. *O'Neil*, 115 F.3d at 274. *O'Neil* did not even consider an argument of unconscionability. Likewise, in *Johnson*, the district court invalidated an arbitration clause in an employment application for lack of consideration, reasoning that the employer had not incurred a detriment because it had not affirmatively agreed to consider the application if the applicant agreed to the arbitration clause. *Johnson*, 148 F.3d at 377. The Fourth Circuit relied upon *O'Neil* to hold that both parties were bound by the arbitration clause, and therefore consideration existed. *Johnson*, 148 F.3d at 378. Once again, the court did not apply any unconscionability analysis. Indeed, there is no suggestion that the applicant even raised the argument that the agreement was unconscionable. Similarly, in *Michalski*, the court considered an argument of lack of consideration, not unconscionability. *Kroll v. Doctor's Associates, Inc.*, 3 F.3d 1167, 1171 (7th Cir. 1993) is even more removed, involving a case in which the parties were both "mutually obligated to arbitrate all disputes." *Kroll*, 3 F.3d at 1171. It has nothing in common with the Ninth Circuit opinion, and certainly does not conflict. In fact,

none of these cases conflict with the Ninth Circuit opinion because the litigants therein did not even raise an unconscionability argument.

Harris considered claims that an arbitration clause in a loan document lacked mutuality and was unconscionable. Applying Pennsylvania law (183 F.3d at 181-82), the Third Circuit held that the agreement was not unenforceable for lack of mutuality. *Harris*, 183 F.3d at 179-182. When it reached the issue of substantive unconscionability (distinguished from procedural unconscionability due to the arbitration agreement appearing in fine print on the reverse of the contract), the court simply referenced its earlier holding about the lack of mutuality. *Harris*, 183 F.3d at 183. There is scant independent analysis on that issue, and no suggestion that the applicable (Pennsylvania) law would invalidate a contract on those grounds. Nor did *Harris* involve arbitration in the drafter's corporate offices, another factor supporting a finding of unconscionability in this case. In short, *Harris* involved a different agreement, different facts, and the law of a different state. It does not conflict with the Ninth Circuit opinion.

Consistent with the Ninth Circuit, these cases recognized that state law defenses can apply. There is no split among the circuits on that rule of law. Most of them did not even address an argument that the agreement was unconscionable. They may have, under different facts and law, and in light of different arguments, reached a different result. The conflict, if any, is a conflict among the law of different states, and not appropriate for resolution by this Court.

II. THE NINTH CIRCUIT OPINION DOES NOT CONFLICT WITH ANY DECISIONS OF THIS COURT.

A. THE NINTH CIRCUIT OPINION DOES NOT CONFLICT WITH *ERIE* OR *KLAXON*.

In its Argument I (Petition, pp. 14-17), Choice argues that the method in which the Ninth Circuit applied Montana law violates the principles of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) and *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941) because the Court concluded that Montana law would apply the principle of unconscionability, even in the context of a contract between business persons. Thus, according to Choice, the Ninth Circuit decision conflicts with *Erie* and *Klaxon*, requiring review by this Court.

While Choice dresses this argument as a violation of the doctrines of *Erie* and *Klaxon*, the argument is, at bottom, simply that the Ninth Circuit reached an incorrect result while applying Montana law. Notably, Choice does not argue that Montana law should not have been applied. The rules of *Erie* and *Klaxon* require the Ninth Circuit to apply Montana law. Indeed, the pronouncements of this Court leave no doubt that state law principles of unconscionability apply. *See* discussion, *supra*, p. 6. The Ninth Circuit properly understood that it must apply state law. Choice simply argues that the result was wrong, and asks this Court to correct the asserted error. Under Rule 10, Supreme Court Rules, this is not a basis for granting certiorari.

More fundamentally, however, Choice's argument misunderstands the duty of a federal court to apply state

law when sitting in diversity. Choice recognizes that the district court, sitting in diversity, was bound by *Erie* to apply Montana law. Petition, p. 15.[1] Choice argues, however, that the district court and the Ninth Circuit incorrectly applied Montana law because, absent a Montana decision directly on point, the lower courts were prohibited from "speculating as to which line of cases Montana courts would ultimately adopt." Petition, p. 17. Thus, Choice's argument is that the Ninth Circuit improperly divined Montana law on an issue not directly addressed by the Montana courts, *i.e.*, would an unconscionability analysis apply even in a contract between businessmen. Choice's argument does not state a ground for granting certiorari because the Ninth Circuit was bound to do precisely what it did, *i.e.*, to decide how the state's highest court would decide that issue. Further, this Court will not disturb the Ninth Circuit's determination of that question because it is supported by Montana law.

When sitting in diversity and therefore applying the law of the forum state, a federal court may be faced with unsettled questions of state law. If so, "the federal court must decide how the state's highest court would decide the issue." 17A *Moore's Federal Practice*, § 120.31[1][b][iii] (Matthew Bender 3d ed. 2001). *See also Comm'r v. Bosch*, 387 U.S. 456, 465 (1967) (absent controlling precedent by highest state court, federal courts "must apply what they find to be the state law . . . "). Federal courts have a duty to apply state law even where that state law is "uncertain

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[1] In spite of that concession, Choice later, in an aside, suggests that "it was improper for the Ninth Circuit to apply Montana law . . . in the first instance." Petition, p. 16.

or difficult to determine." *Meredith v. City of Winter Haven*, 320 U.S. 228, 236 (1943). In such a case, this Court has answered questions of state law, "although the highest court of the state had not answered them," "with the aid of such light as was afforded by the materials for decision at hand, and in accordance with the applicable principles for determining state law." *Meredith*, 320 U.S. at 237. Clearly, the Ninth Circuit correctly discerned that it was bound to determine how the highest court of Montana would decide an issue of state law which was not addressed in existing precedent. Petition, App., p. 11. In other words, even if the Ninth Circuit had erred in its application, it was a "properly stated rule of law" which is "rarely" a basis for granting certiorari.

Where lower federal courts have decided an unsettled question of state law in a manner that is supported by "reasonable arguments", this Court's "general policy" is to "leave undisturbed" the Court of Appeals' holding on state law. *Spiegel's Estate v. Comm'r*, 335 U.S. 701, 708 (1949). *Spiegel's Estate* noted that the circuit judges were constantly required to apply the law of the state in question. 335 U.S. at 707. Further, examination of the state law had left this Court "unable to say with any degree of certainty that the Court of Appeals' holding was wrong." 335 U.S. at 708. The same applies in this case. The Ninth Circuit is often called upon to apply Montana law. Further, there are reasonable arguments supporting the Ninth Circuit's conclusion that the Montana Supreme Court would apply an unconscionability analysis even in the context of a contract between businessmen.

The crux of Choice's argument is that Montana law, and notably *Iwen v. U.S. West Direct*, 293 Mont. 512, 977

P.2d 989 (1999), do not apply the unconscionability test to contracts between businessmen. Petition, pp. 14-17. However, *Iwen* involved an attorney who purchased an advertisement for his law office. *Iwen*, 977 P.2d at 991. It is a "reasonable argument" that Mr. Iwen was as much a businessman as James Ticknor, and that the same analysis would apply. Further, the test for unconscionability, as framed by *Iwen*, does not require that one of the parties be a consumer as opposed to a businessman. *Iwen*, 977 P.2d at 995.

The test focuses, initially, on disparity of bargaining power. *Id.* The record in this case contains financial information concerning the parties, showing: Choice with total assets of more than $445 million and annual revenues of $140 million (*see* Exhibit 5 to Sept. 15, 1999 hearing, pp. 1-4, admitted at transcript p. 4); Mr. Ticknor with a net worth of $684,412 (Exhibit 12, admitted at transcript, p. 4); and the other franchisee, Ticknor Lodging Corp., with total assets of $14,305 (Exhibit 13, admitted at transcript, p. 4) and annual gross revenues of $344,650 (Exhibit 14, admitted at transcript, p. 4).

Finally, the Ninth Circuit also relied upon *In re: Michael's Estate*, 264 Mont. 261, 266, 871 P.2d 272, 275 (1994), in which the Montana Supreme Court had stated the "indicia of unconscionability relating to a [contract] between two business professionals." The Montana Supreme Court, far from ruling out application of the doctrine of unconscionability in contracts between business people, had spelled out the test for such an analysis. Thus, the Ninth Circuit did not err when it concluded that, under Montana law, the test applied even between business people.

In light of all of the foregoing, "reasonable arguments" exist in favor of the Ninth Circuit's construction of Montana law, and this Court cannot conclude "with any degree of certainty" that such determination was wrong. *See Spiegel's Estate, supra.* While Choice disagrees with the result, it is plain that the Ninth Circuit did not violate the doctrines of *Erie, Klaxon,* or any other federal principle. Choice asks this Court to correct alleged error (that Montana would apply an unconscionability analysis to contracts between business persons) which is not even erroneous.

Finally, Choice faults the Ninth Circuit for "ignor[ing]" other Montana cases, notably *All-States Leasing Co. v. Top Hat Lounge, Inc.*, 198 Mont. 1, 649 P.2d 1250 (1982). Choice, however, never cited either *All-States,* or any similar case, for the proposition which it now urges. This Court should not grant certiorari to review an argument which the Ninth Circuit had no opportunity to address.

B. THE DECISION OF THE NINTH CIRCUIT DOES NOT CONFLICT WITH *CASAROTTO.*

Choice argues that, by invalidating the arbitration agreement based upon state law, the Ninth Circuit violated the standards enunciated in *Doctor's Associates, Inc. v. Casarotto,* 517 U.S. 681 (1996). Petition, pp. 17-21. According to Choice, the unconscionability analysis contained in Montana law which the Ninth Circuit applied to invalidate the arbitration provision, singles out arbitration agreements and therefore is preempted. *See* Petition, App., pp. 17-21. To the contrary, the Ninth Circuit did not

run afoul of *Casarotto*, or any other pronouncements by this Court, in applying state law on the question of the unconscionability of the arbitration provision.

Casarotto specifically stated that "generally applicable contract defenses, such as . . . unconscionability, may be applied to invalidate arbitration agreements without contravening § 2." *Casarotto*, 517 U.S. at 686-87. Unlike *Casarotto*, which involved a state statute requiring a notice, in certain size type, on the front of any contract containing an arbitration clause, this case involves a standard contract defense of general applicability.

Perhaps recognizing that state law does apply, Choice attempts to argue that the Ninth Circuit misapplied that law by failing to recognize that Montana law does not inquire into the adequacy of consideration. Petition, App., pp. 18-19. This argument, once again, is simply that there has been a misapplication of a properly stated rule of law. Such error correction is not a basis for granting certiorari. More fundamentally, however, it misunderstands what the Ninth Circuit held. The Ninth Circuit did not hold that, under Montana law, the arbitration provision was void for lack of consideration. It held that it was void as unconscionable. Petition, App., p. 17. Certainly, the fact that Choice reserved the right to sue on its monetary claims, but the Ticknors had to arbitrate their claims, was relevant to that inquiry. *Kelly v. Widner*, 236 Mont. 523, 528, 771 P.2d 142, 145 (1989) (stating in the context of a release of claims for personal injury, that "[i]nadequacy of consideration does not by itself invalidate a bargain, but may be a factor in determining conscionability"). However, the basis for the Ninth Circuit's holding was not simply failure of consideration, but

unconscionability of the arrangement as a whole, including the requirement that arbitration occur in Choice's headquarters office.

Choice next argues that the *Iwen* unconscionability analysis is preempted because it singles out arbitration clauses. Thus, Choice argues that Montana law is "hostile to, or applicable only to, agreements to arbitrate." Petition, p. 20. The Ninth Circuit found otherwise, specifically noting that, under Montana law, the principles of *Iwen* were "general principles that exist at law or in equity for the revocation of any contract." Petition, App., p. 16. Moreover, the Ninth Circuit has since demonstrated that it understands full well the difference between generally applicable contract defenses, and those which would serve only to invalidate an arbitration clause. *See Bradley v. Harris Research, Inc.*, 2001 WL 1658728 (9th Cir., December 28, 2001), at 5, n. 7.

A review of Montana cases demonstrates that the Ninth Circuit was correct in finding the unconscionability analysis to be applicable to contracts generally, and not to single out arbitration clauses. First, the unconscionability analysis has long been applied in varied contexts. *See, e.g., Wilkes v. Estate of Wilkes*, 305 Mont. 335, 27 P.3d 433 (2001) (prenuptial agreement); *In re Marriage of Pearson*, 291 Mont. 101, 965 P.2d 268 (1998) (settlement agreement in divorce); *Kelly v. Widner*, 236 Mont. 523, 771 P.2d 142 (1989) (release of claims for personal injury); *Eigeman v. Miller*, 229 Mont. 28, 745 P.2d 320 (1987) (provisions of an installment land contract); *Beneficial Commercial Corp. v. Cottrell*, 212 Mont. 493, 688 P.2d 1254 (1984) (limitation of remedies in equipment lease). The principle of

unconscionability is a well known, and oft-applied, contract defense. Its application does not "single out" arbitration agreements, and is therefore not preempted.

Second, the Montana Supreme Court has upheld arbitration clauses in the face of arguments of unconscionability. *See Chor v. Piper, Jaffray & Hopwood, Inc.*, 261 Mont. 143, 149, 862 P.2d 26, 30 (1993) (reversing trial court's decision invalidating arbitration clause, and explaining that "an arbitration clause may be enforced even if the agreement in which the clause appears is an adhesion contract, absent evidence that the arbitration clause was not within the parties' reasonable expectations or that the clause is oppressive or unconscionable"); *Passage v. Prudential-Bache Securities, Inc.*, 223 Mont. 60, 727 P.2d 1298 (1986). The cases simply do not demonstrate any hostility to arbitration clauses *per se*. Instead, as permitted under *Casarotto*, under Montana law the concept of unconscionability is applicable to contracts generally, and does not invalidate even arbitration clauses absent the same factors which must be found to invalidate any other contract.

Unlike *Casarotto*, this case does not involve a statute or principle which applies only to arbitration clauses. It involves, instead, a state law principle which is applicable to contracts generally. Indeed, it involved a defense which this Court has specifically enumerated as a permissible state law contract defense.

In short, this Court has specifically recognized that state law principles, such as unconscionability, may be applied to invalidate arbitration agreements without running afoul of § 2 of the FAA. That is what the Ninth

Circuit did. Choice argues that this is a wrong result, but there can be no question that the rule of law was properly stated. Accordingly, this is not a ground to grant certiorari.

III. CHOICE'S "REASONS FOR GRANTING THE WRIT" STATE, AT MOST, ALLEGEDLY ERRONEOUS FACTUAL FINDINGS OR MISAPPLICATION OF A PROPERLY STATED RULE OF LAW.

Supreme Court Rule 10 states that "certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Choice's petition complains not about the rules of law applied by the Ninth Circuit, but only about the result it reached. In other words, Choice asserts erroneous factual findings and misapplication of a properly stated rule of law.

For instance, Choice complains about alleged inaccuracies in the factual findings of both the trial court and the Ninth Circuit. Petition, p. 8. *See also id*, p. 10, n. 4. Both passages argue about the accuracy of the lower courts' application of the choice of law analysis. Choice does not attempt to argue, however, that the Ninth Circuit applied the wrong analysis altogether. Indeed, Choice conceded in its Ninth Circuit briefs that "a federal court sitting in diversity must look to the law of the forum state in making a choice of law determination" and that "Montana courts apply the Restatement (Second) of Conflict of Laws, § 187 (2) in resolving the question. . . . " Choice's Ninth Circuit opening brief, p. 17; Choice's Ninth Circuit reply brief, p. 10. That is precisely the

analysis which the Ninth Circuit applied. Petition, App., pp. 7-9. Thus, Choice argues only that the Ninth Circuit reached an incorrect result while applying the correct rule of law. Such alleged error is not within Sup. Ct. Rule 10, nor worthy of this Court's attention.

Similarly, Choice's Argument I (Petition, pp. 14-17) argues that the Ninth Circuit reached an incorrect result in applying Montana's test for the unconscionability of a contractual provision. Choice argues that the Ninth Circuit misunderstood, and therefore misapplied, Montana law. For instance, it argues that the Ninth Circuit "ignored the facts" of controlling Montana precedent, and ignored other Montana case law. Petition, App., p. 15. Thus, according to Choice, the Ninth Circuit improperly extended the holding of the controlling Montana case, and failed to properly "apply the law of Montana as it existed . . . " Petition, App., p. 16. Accordingly, Choice concludes that "the Ninth Circuit ignored [the controlling principles of state law] and instead relied upon inapplicable precedents . . . " Petition, App., p. 17.

Further, as discussed *supra*, while Choice tries to demonstrate a conflict with *Erie*, its argument is essentially that, while obligated to apply state law, the Ninth Circuit misapplied that law. Once again, Choice is asking this Court to correct alleged error in applying a properly stated rule of law.

Finally, even the error which Choice does claim is illusory. The Ninth Circuit properly applied state law.

CONCLUSION

The Ninth Circuit opinion conflicts with neither decisions of this Court nor decisions by other Circuit Courts of Appeals. The issue is both fact intensive and state law dependent, and not appropriate for consideration by this Court.

Respectfully submitted,

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